Supreme Court, U.S.
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No. 09-879

# In The
# Supreme Court of the United States

KAREN WAESCHLE, individually and on behalf of others similarly situated,

*Petitioner*,

v.

OAKLAND COUNTY MEDICAL EXAMINER, LJUBISA J. DRAGOVIC, M.D., individually and In his official capacity as Medical Examiner of Oakland County, Michigan, and on behalf of Others similarly situated, et al.,

*Respondents*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## BRIEF IN OPPOSITION

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## I.

## INTRODUCTION

In this 42 U.S.C. §1983 case, the United States Court of Appeals for the Sixth Circuit was faced with the question of whether Petitioner had a right under Michigan law to possess her mother's brain after it had been properly removed, dissected and examined by a county medical examiner following an authorized autopsy in a criminal investigation. Recognizing that no such right was clearly established, the Court of Appeals held the medical examiner was immune. As to the county government, the Court of Appeals concluded it could not determine whether Michigan law recognized a right to possess the brain under the circumstances and directed the District Court to certify the question to the Michigan Supreme Court. The District Court has done so and the matter is currently pending in the Michigan Supreme Court.

Petitioner claims the Sixth Circuit has impermissibly invited the Michigan Supreme Court to overrule binding federal constitutional decisions on this issue. Petitioner's petition should be denied for two reasons. **First**, there are no decisions on this issue, the Sixth Circuit held that the decisions relied on by Petitioner are clearly distinguishable, and it followed the admonition of this Court to defer to the state when state law is unsettled. **Second**, as Petitioner recognizes, there is no compelling reason for this Court to hear this case at this time. Quite simply, Petitioner is concerned that the Michigan Supreme Court has been "invited" to decide the state law issue and it is "possible" the state court may not rule in her favor. At this time, she has suffered no harm and,

depending on the action of the Michigan Supreme Court, may never. Petitioner's request for an advisory opinion from this Court on the assumption that she will lose in the Michigan Supreme Court is improper.

## II.

## STATEMENT OF THE CASE

The Sixth Circuit Court of Appeals held that the doctrine of qualified immunity protected Oakland County Medical Examiner Ljubisa J. Dragovic against the claims brought by Petitioner under 42 USC §1983. Petitioner's claimed property right to the return of the brain of her mother following a properly authorized autopsy is not clearly established. The Court held that the facts in this case distinguished it from any existing federal cases:

> *Brotherton* [*v. Cleveland*, 923 F.2d 477 (6th Cir. 1991)] and *Whaley* [*v. County of Tuscola*, 58 F.3d 1111 (6th Cir. 1995)], however, are distinguishable from the present case. The key difference is that the brain of Waeschle's mother was removed and retained for study by the Medical Examiner in furtherance of a lawful criminal investigation. By contrast, the removal of corneas in *Brotherton* and *Whaley* served no investigative function whatsoever.

576 F.3d 539, 546-47.

In *Brotherton*, the plaintiff filed a §1983 claim because the coroner removed her husband's corneas during an autopsy after she had specifically refused to allow this to be done. The removal of the corneas was

unrelated to the investigative purpose of the autopsy. The Sixth Circuit held that Ohio law gave the plaintiff sufficient rights to create a legitimate claim to entitlement to the return of her husband's corneas. *Brotherton* did not concern, analyze or apply Michigan law in any respect.

*Whaley* did. *Whaley* arose after it was discovered that the assistant to a pathologist removed the corneas and sometimes the eyeballs of corpses after an autopsy was finished and then sold them for a profit, without the knowledge or the consent of the next-of-kin of the decedent. The removal of the corneas and eyeballs was unrelated to the investigative purpose of the autopsy. As the Sixth Circuit stated, "The interesting question raised in this consolidated appeal is what relief the Constitution might provide when a state actor steals the eyes of a dead man." 58 F.3d. at 1112-13. Relying primarily on its interpretation of two 19th century decisions of the Michigan Supreme Court, the Sixth Circuit held that under Michigan law the next-of-kin have a right to possess the body for burial and prevent its mutilation. *Id.* at 1115.

In this case, the Sixth Circuit distinguished *Whaley* and determined that no Michigan decision had considered the situation presented here:

> None of these cases consider the situation where body parts were removed and retained during an autopsy for study in the course of a properly authorized criminal investigation.

***

> In sum, Michigan law regarding the rights of the next of kin in their relative's body parts removed for forensic examination during an autopsy is at best equivocal.

Id at 549, 550.

The Court questioned whether any right existed under Michigan law to the return of a brain which was removed and examined as part of a criminal investigation during a properly authorized autopsy. Noting that *Whaley* did not involve the Michigan Medical Examiner statute (MCL 52.205) and that no federal or Michigan case involved the failure to return a body part which had been removed pursuant to a valid investigative reason during an autopsy, the Court found Petitioner's due process claim turned on the answer to this unsettled question of state law. 576 F.3d at 550-51. Accordingly, the Sixth Circuit directed the District Court to certify the question to the Michigan Supreme Court for resolution. The District Court certified the question to the Michigan Supreme Court (Order of November 2, 2009, Appendix A), where the matter is currently pending.

## III.

## ARGUMENT

### THE SIXTH CIRCUIT PROPERLY SOUGHT A DEFINITIVE RULING ON UNCERTAIN MICHIGAN LAW FROM THE MICHIGAN SUPREME COURT

There is no question that federal constitutional law ultimately determines whether an underlying property

interest is protected by the due process clause of the Fourteenth Amendment. *Memphis Light, Gas & Water Div. v. Kraft*, 436 U.S. 1, 9, 56 L. Ed. 2d 30, 98 S.Ct. 1554 (1978). There is also no question that "(r)esolution of the federal issue begins, however, with a determination of what it is that state law provides." *Town of Castlerock v. Gonzales*, 545 U.S. 748, 757, 162 L. Ed. 2d 658, 125 S.Ct. 2796 (2005). Moreover, as this Court has recognized, "(f)ederal courts lack competence to rule definitively on the meaning of state legislation." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 48, 137 L. Ed. 2d 170, 117 S.Ct. 1055 (1997). For that reason, this Court has encouraged certification of questions concerning uncertain state law to the appropriate state court:

> "Certification procedure, in contrast, allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response. ... (to warrant district court certification, "it is sufficient that the statute is susceptible of ... an interpretation (that) would avoid or substantially modify the federal constitutional challenge to the statute.").

*Id.* at 76-77.

In this case, the Sixth Circuit carefully examined and considered all of the case law and statutes cited by Petitioner in support of her claim before concluding it was not certain whether Michigan law gave Petitioner the property interest she claimed in her deceased mother's brain. Had it chosen to do so, the Sixth

Circuit could also have pointed to at least two decisions from Michigan state courts that cast further doubt on Petitioner's assertion of a property right in her mother's brain under Michigan law. In *Dampier v. Grace Hospital*, 233 Mich. App. 714, 592 N.W. 2d 809 (1999), the Michigan Court of Appeals stated that, "Michigan does not recognize a property right in a dead body" and that any "common law right of burial of a deceased person without mutilation ... is not of constitutional dimension." 233 Mich. App. at 731. In *Summers v. Hurley Medical Center*, Michigan Court of Appeals Case No. 269824 (August 23, 2007) (Appendix B), the Michigan Court of Appeals upheld the dismissal of a complaint attempting to set forth a number of state law claims arising from the removal of the plaintiff's decedent's heart during an autopsy without her knowledge or authorization and the failure to return the heart for three years. In upholding the dismissal of the complaint, the court stated, "Plaintiff ... (alleged) a claim based on the common law tort of interference with the right of burial of a deceased person with mutilation ...an essential element of the tort is that the alleged mutilation must be wrongful."

This Court has a long-standing policy of paying deference to the view of a federal court concerning the laws of a state within its jurisdiction. *Phillips v. Washington Legal Found.*, 524 U.S. 156, 167, 141 L. Ed. 2d 174, 118 S.Ct. 1925 (1998). At least in part, this is based on this Court's belief "that district courts and courts of appeal are better schooled in and more able to interpret the laws of their respective states." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500-501, 86 L. Ed. 2d 394, 105 S.Ct. 2794 (1985).

> "(I)t is precisely when there is no state law on point that the presumption that circuits have local expertise plays any useful role. When a circuit's resolution of a novel question of state law is grounded on a concededly complete review of all the pertinent state-law materials, that decision is entitled to deference."

*Town of Castle Rock v. Gonzales*, 545 U.S. 748, 776, 162 L. Ed. 2d 658, 125 S. Ct. 2796 (2005) (Stevens, dissenting.).

There simply is no reason for this Court to depart from its practice of deference in this case. The Sixth Circuit undertook a careful review of applicable Michigan law before finding that there was no clearly established property right such as the one asserted by Petitioner and, therefore, properly dismissed the claims against the medical examiner. It also sought a definitive interpretation of Michigan law from the highest state court of Michigan – a completely appropriate and uncontroversial decision under the circumstances of this case – especially pertinent since this Court's recent decision in *Pearson v. Callahan*, 129 S.Ct. 808 (2009).

The decision of the Sixth Circuit does not seek to abrogate vested rights as claimed by Petitioner. Rather, it seeks the decision of the only court which is authorized to determine unsettled questions of Michigan law – the Michigan Supreme Court.

## THERE ARE NO "COMPELLING REASONS" TO GRANT CERTIORARI IN THIS CASE

The rules of this Court state that "(a) petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. The only actual reason the Petitioner has provided in her Petition is that she disagrees with the decision of the Sixth Circuit. Obviously, the decision of the Sixth Circuit was not what Petitioner had hoped for, but if Petitioner actually has a property right under Michigan law to her mother's brain after the completion of a lawful and properly authorized autopsy, she has little to fear from this decision, since the Michigan Supreme Court is presumably capable of recognizing Michigan property rights.

Petitioner apparently is not confident the highest court of Michigan will favor her. Petitioner argues that certification of the issue is inappropriate because the Sixth Circuit had already determined that the conduct complained of by Petitioner is a violation of the federal Constitution. Reading Petitioner's argument after reading the opinion of the Sixth Circuit, one cannot help but feel like Alice must have felt after stepping through the looking glass and finding things the opposite of what they were in the real world. In fact, the Sixth Circuit has never determined that the conduct at issue is a violation of the federal Constitution, and it has not asked the Michigan Supreme Court to address any issue of federal law. That may be why the court unanimously ruled against Petitioner and also why Petitioner's request for a rehearing and rehearing en banc was denied.

Petitioner asserts again and again and again that both Michigan and federal law are settled on the material issues considered by the Sixth Circuit. However, the Court found that the reasoning it applied in determining that when a person acting under color of state law steals a body part for private gain does not dictate the outcome of a case in which a medical examiner performs a properly authorized autopsy and properly retains a body part for forensic examination related to a criminal investigation.

Petitioner's second argument is that, by directing the Michigan Supreme Court to answer the question of whether a decedent's next-of-kin have a right under Michigan law to possess the decedent's brain after it has been removed by a medical examiner in order to conduct a lawful criminal investigation into the decedent's cause of death, the Sixth Circuit is somehow inviting the state court to interpret or overrule federal law or retroactively eliminate existing rights under federal law. This argument is equally without merit. The Sixth Circuit invited and directed only what federal courts are empowered to do – to ask the highest court of the state to determine a question of uncertain state law. Petitioner would prefer that *Whaley* be dispositive on the issue of the existence of a property right under Michigan law under the circumstances of this case and the Petitioner's right to proceed with a claim under §1983. This is a claim the parties thoroughly briefed and argued before the Sixth Circuit, and one which the Sixth Circuit carefully examined and rejected in its decision.

Petitioner's attempt to now ignore the actual analysis and directive of the court below can do nothing to change that analysis or directive. The Sixth

Circuit could not have been clearer. It did not ask the Michigan Supreme Court to apply, interpret, or overrule federal law or the United States Constitution. It only asked the Michigan Supreme Court to do what it is well qualified to do – interpret Michigan law, just as the federal court in Ohio simply asked the Ohio Supreme Court to interpret Ohio law in *Albrecht v. Treon*, No. 1:06CV274, 2007 U. S. Dist LEXIS 18613 (S.D. Ohio Mar. 12, 2007), another decision to which Petitioner makes a point of objecting, even though it is not before this Court. In fact, federal courts turn to state courts for their superior understanding and interpretation of the laws of their own states not only when the law is uncertain, but also when a state court decision raises a question as to whether a decision of a federal court interpreting that law was correct. *E.g., D. L. Thomas v. Am. Home Prods., Inc.*, 519 U.S. 913, 913-914, 136 L. Ed. 2d 201, 117 S.Ct. 282 (1996) (Scalia, concurring.).

Finally, review by this Court at this time is premature and would constitute the constitutional harm which Petitioner claims is hers – it would intrude into Michigan's sovereignty. It is premature in Petitioner's own words – she is concerned it is "possible" the Michigan Supreme Court will rule against her because the Sixth Circuit "invited" it to overrule federal constitutional law. Petitioner's Petition at 11. Regardless of Petitioner's mischaracterization and the Michigan Supreme Court's demonstrated independence from the federal courts over the years, Petitioner has not been harmed and my never be harmed. The decision of the Michigan Supreme Court will merely return the case to the District Court where further proceedings will occur. No discovery has occurred in this case and the

full factual record has yet to be developed. Either party who is aggrieved after a final decision by the District Court has a right to appeal, eventually to this Court. As to sovereignty and federalism and despite Petitioner's protestations to the contrary, it is Petitioner who is inviting this Court to intrude into a realm reserved to Michigan – deciding the property rights of its citizens. Whether those rights are of constitutional dimension may be a question for the federal courts, but the foundational decision is Michigan's. *Town of Castlerock v. Gonzales*, 545 U.S. 748, 757, 162 L. Ed. 2d 658, 125 S.Ct. 2796 (2005).

## IV.

## CONCLUSION

This case does involve significant issues. However, the decision of the Sixth Circuit is not an attack on the principles of federalism or an attempt to destroy rights granted by federal law. It is simply a request for an interpretation of uncertain state law by a state court. The imagined parade of horribles chronicled in Petitioner's pleadings do not exist. There are no compelling reasons to grant her Petition – she complains only of a potential to suffer harm which has not occurred. Her Petition should be denied.

Respectfully submitted,

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February 23, 2010

# APPENDIX

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## APPENDIX A

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**CASE NUMBER: 08-10393**
**HONORABLE VICTORIA A. ROBERTS**

**[Filed November 12, 2009]**

KAREN WAESCHLE, individually and on behalf of others similarly situated,

Plaintiff(s),

v.

OAKLAND COUNTY MEDICAL EXAMINER, LJUBISA J. DRAGOVIC, M.D., individually and in his official capacity as Medical Examiner of Oakland County, Michigan, and OAKLAND COUNTY, MICHIGAN, a municipal corporation,

Defendant(s).

### ORDER

Pursuant to the Judgment from the Sixth Circuit entered on July 22, 2009, this Court granted

Defendants' Motion for Summary Judgment, and entered Judgment in favor of Defendants on August 3, 2009.

On August 14, 2009, the Sixth Circuit filed an Amended Opinion.

Pursuant to the Amended Opinion, this Court's August 3, 2009 Order and Judgment (Docs. #83 and #84) are **VACATED**, Dr. Ljubisa J. Dragovic's Motion for Summary Judgment (Doc. #49) is **GRANTED** with respect to Plaintiff's individual-capacity claim against him, and Defendants' motion to certify the question of state law to the Michigan Supreme Court (Doc. #49) is **GRANTED**.

On or before **November 30, 2009**, Defendants must file a brief with this Court that addresses why they believe the Michigan Supreme Court should decide the question of state law, and why they believe Michigan law has not established a property right in body parts. Plaintiff must respond by **December 14, 2009**.

The Court will send a letter, the briefs, and the Amended Opinion from the Sixth Circuit to the Michigan Supreme Court. All proceedings in this Court will then be stayed pending the outcome in the Michigan Supreme Court.

**IT IS ORDERED**.

S/Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: November 12, 2009

The undersigned certifies that a copy of this document was served on the attorneys of record by electronic means or U.S. Mail on November 12, 2009.

s/Carol A. Pinegar
Deputy Clerk

* **NOTE:** All briefs shall comply strictly with LR 7.1 (Statement of Issues, Statement of Controlling/Most Appropriate Authority), and, in addition, **must** contain a Table of Contents, an Index of Authorities and an Index of Exhibits. The Exhibits must be tabbed. LR 7.1(a) seeking concurrence requirement and the format requirements as set forth in LR 5.1 must be strictly adhered to. **Relevant passages of exhibits must be highlighted on the Judge's courtesy copy.**

## APPENDIX B

**STATE OF MICHIGAN**
**COURT OF APPEALS**

**No. 269824**
**Genesee Circuit Court**
**LC No. 05-081687-CZ**

**UNPUBLISHED**
**August 23, 2007**

TINA SUMMERS,

Plaintiff-Appellant,

v

HURLEY MEDICAL CENTER, PATHOLOGY ASSOCIATES, P.C., GARY JOHNSON, CATHY O. BLIGHT, JERRY S. KRZNARICH, and LINDA BIEDRZYCKI,

Defendants-Appellees

and

MARCIA E. PERRY,

Defendant.

Before: Davis, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order dismissing this case, with prejudice, with respect to each defendant-appellee. We affirm the order of dismissal, but vacate the portion of the trial court's April 3, 2006, order awarding attorney fees and costs to defendant Hurley Medical Center.

On June 20, 2005, plaintiff filed a complaint against the six defendants-appellees, Hurley Medical Center (hereafter "Hurley Medical"), Pathology Associates, P.C. (hereafter "Pathology P.C."), Lynda Biedrzycki,[1] Jerry Krznarich, Gary Johnson, and Cathy Blight, and two other defendants, Hurley Health Services and Marcia Perry, arising out of the alleged mishandling of her son's body after he died on March 15, 2001. The complaint alleged that the decedent's heart was removed, without plaintiff's knowledge or authorization, as part of an autopsy to determine the cause of death. The heart was allegedly transferred to Biedrzycki, a medical examiner in the state of Wisconsin, for an examination, but was not returned to Michigan until March 2004. Plaintiff allegedly made several inquiries regarding the status of the autopsy and learned about the removal of the decedent's heart before Biedrzycki returned the heart to Michigan. Plaintiff alleged claims against the

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[1] Although the April 12, 2006, order and this Court's docket caption identify Biedrzycki's first name as "Linda," the original complaint contained the spelling "Lynda," consistent with Biedrzycki's own appeal brief.

various defendants based on gross negligence (Count I), ordinary negligence (Count II), interference with right of burial (Count III), negligent infliction of emotional distress (Count IV), and intentional infliction of emotional distress (Count V).

Answers to the complaint were thereafter filed by Johnson and Biedrzycki in August 2005, and by Blight and Hurley Health Services in September 2005. On October 17, 2005, the trial court entered a stipulated order granting Hurley Medical's motion for a more definite statement. The trial court ordered that plaintiff file a more definite statement with respect to each defendant. Despite being afforded two opportunities to do so, plaintiff failed to conform her complaint to the trial court's ruling leading to the ultimate dismissal of her action.

On appeal, plaintiff first challenges the trial court's December 12, 2005, order requiring that she file a second more definite statement. In general, a plaintiff's claims may be involuntarily dismissed for failure to comply with the court rules or a court order. MCR 2.504(B)(1). A dismissal for failure to comply with a court order is reviewed for an abuse of discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Such a dismissal is a drastic sanction that requires consideration of several factors, including:

> (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the

> court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 506; 536 NW2d 280 (1995) (citation omitted).]

In this case, it is apparent that the trial court did not rely solely on plaintiff's failure to comply with its order requiring plaintiff to file a second more definite statement when dismissing the case, but also considered the merits of plaintiff's various claims with respect to both the notice of a claim that it afforded to defendants-appellees and whether the allegations were sufficient to state a claim. Here, plaintiff argues that a second amended complaint was unnecessary because her earlier more definite statement was sufficient to both provide adequate notice and state a claim.

"Each allegation in a pleading must be clear, concise, and direct." MCR 2.111(A)(1). The complaint must contain "[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." MCR 2.111(B)(1); see also *Iron Co v Sundberg, Carolson & Assocs, Inc*, 222 Mich App 120, 124; 564 NW2d 78 (1997). The degree of specificity sufficient to satisfy the court rule generally depends on the circumstances of the case and the nature of the action. *Dacon v Transue*, 441 Mich 315, 332; 490 NW2d 369 (1992); *Porter v Henry Ford Hosp*, 181 Mich App 706, 709; 450 NW2d 37 (1989); *Martinez v Redford Community Hosp*, 148 Mich App 221, 229-230; 384 NW2d 134 (1986); but see MCR 2.112(B)(2) (conditions of the mind may be pleaded generally).

We review a trial court's decision regarding the meaning and scope of a pleading for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). A trial court's decision on a defendant's motion for a more definite statement or to strike a pleading that allegedly is so vague or ambiguous that it does not conform with the rules, is also reviewed for an abuse of discretion. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 469; 666 NW2d 271 (2003). A trial court abuses its discretion when its decision "results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

But if a defendant's real challenge to the complaint is that the complaint does not state a claim, the motion may be treated as a motion for summary disposition under MCR 2.116(C)(8). See *Hetterle v Chido*, 155 Mich App 582, 586; 400 NW2d 324 (1986). Such as motion is reviewed de novo based on the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 118-119; 597 NW2d 817 (1999). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* at 119. Summary disposition is appropriate only if the claims are so clearly unenforceable as a matter of law that no factual development could justify recovery. *Id.* Conclusory statements, unsupported by factual allegations, are insufficient to state a claim. *Ypsilanti Fire Marshal v Kircher (On Reh)*, 273 Mich App 496, 544; 730 NW2d 481 (2007). Similar to the discretion afforded to a trial court under MCR 2.115, to grant a defendant's motion for a more definite statement, a plaintiff against whom summary disposition is granted under MCR 2.116(C)(8) may move to amend the

complaint. See MCR 2.116(I)(5); *Weymers*, *supra* at 654.

In this case, considering that plaintiff brought multiple counts against multiple defendants and that the record discloses that the trial court believed that summary disposition motions would likely be filed if a more definite statement was not provided, we find merit to plaintiff's argument that MCR 2.116(C)(8) might provide a more appropriate framework for determining the sufficiency of some of her claims against defendants-appellees than the standard in MCR 2.111(B). But having considered the allegations in the first more definite statement, we conclude that plaintiff has not demonstrated any claim that was sufficiently pleaded to render the need for another more definite statement, or an amended complaint, unnecessary.

With respect to Pathology Associates, P.C., the more definite statement only alleges that this entity was at all relevant times a professional service corporation doing business in the city of Flint. Thus, the trial court did not abuse its discretion in finding that plaintiff failed to sufficiently plead a claim against Pathology Associates. *Weymers*, *supra* at 454. Plaintiff did not provide allegations that are specific enough to reasonably inform Pathology Associates of the nature of any claim against it. MCR 2.111(B)(1); *Iron Co*, *supra* at 124.

With respect to the five other defendants-appellees, we agree with plaintiff that the use of "group" allegations against multiple defendants in a pleading is not fatal to a determination that MCR 2.111(B) was satisfied, at least in those circumstances where there

exist other allegations directed at a defendant's specific conduct to provide reasonable notice of the claim. *Johnson v A & M Custom Built Homes of West Bloomfield, PC* , 261 Mich App 719, 723; 683 NW2d 229 (2004). Plaintiff's reliance on the afore-stated concept ignores the fact that her "group" allegations were insufficient to reasonably inform the individual defendants-appellees of the nature of the claims against them, as required by MCR 2.111(B). On their face, the "group" allegations suggest some type of concerted action between the individual defendants-appellees located in Michigan in their dealings with the other defendant-appellee, Lynda Biedrzycki, who is located in Wisconsin. The trial court reasonably concluded otherwise, as is evident by its determination that plaintiff needed to file another more definite statement to direct the allegations at the specific defendant-appellee to which they applied. Further, upon considering the allegations that are directed at a specific defendant-appellee, we conclude that the trial court did not abuse its discretion in finding that a second more definite statement was necessary.

The non-group allegations against Hurley Medical Center are ambiguous with respect to whether plaintiff was attempting to hold Hurley Medical Center directly liable or indirectly responsible under some theory of vicarious liability. Vicarious liability rests on imputing the agent's conduct to the principal. *Al-Shimmari v Detroit Medical Center*, 477 Mich 280, 294; 731 NW2d 29 (2007) (negligence). Direct liability may arise, for example, where an entity negligently supervises, selects, or retains staff. See *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 11; 651 NW2d 356 (2002) (medical malpractice action against hospital).

Therefore, as with Pathology Associates, we conclude that the trial court did not abuse its discretion in ruling that plaintiff's allegations with respect to Hurley Medical were not specific enough to reasonably inform it of the nature of any claim against it.

Each of the four individual defendants-appellees allegedly had some role, in a medical examiner capacity, in handling the body of plaintiff's deceased son or authorizing autopsy work, which resulted in the removal and retention of the decedent's heart for further examination. Defendant Jerry Krznarich allegedly performed the autopsy, with the authorization of defendant Gary Johnson, the county medical examiner, and defendant Cathy Blight, the chief deputy county medical examiner, and spoke with plaintiff about the status of the autopsy and cause of death. Biedryncki allegedly received the decedent's heart in 2001, for an examination concerning the cause of death, but did not return the heart to the other defendants-appellees until 2004, long after plaintiff buried her son.

For each of the five counts, plaintiff predicated her right to relief on her parental relationship with the decedent, alleging in Count III a claim based on the common-law tort of interference with the right of burial of a deceased person without mutilation. The recovery in such an action is for the infringement of the person's right to have the body delivered for burial without mutilation, *Deeg v Detroit*, 345 Mich 371, 376; 76 NW2d 16 (1956), although the failure to return severed portions of a body for burial can also form a basis for the action. See 22A Am Jur 2d, Dead Bodies, § 46.

But an essential element of the tort is that the alleged mutilation be wrongful. *Tillman v Detroit Receiving Hosp*, 138 Mich App 683, 689-690; 360 NW2d 275 (1984); *Allinger v Kell*, 102 Mich App 798, 808; 302 NW2d 576 (1981), modified 411 Mich 1053 (1981). Here, plaintiff made vague "group" allegations in the gross negligence and negligence counts regarding the individual defendants-appellees having a duty to refrain from violating the law affecting the handling, custody, care, and transportation of dead human body remains. But plaintiff did not plead any law that was violated or attempt to assign responsibility to any specific defendant-appellee for particular acts of unlawful or wrongful conduct.

Under the circumstances, where multiple individual defendants allegedly took on different roles in the autopsy process, all in some type of medical examiner capacity, the trial court did not abuse its discretion by ordering another more definite statement to delineate the basis of plaintiff's claims. As a whole, the allegations in the more definite statement failed to provide reasonable notice of what plaintiff believed was unlawful interference with respect to each individual defendant-appellee, as required by MCR 2.111(B). Alternatively, plaintiff failed to state a claim for which relief could be granted, because Count III is based on conclusory statements, unsupported by factual allegations of any actionable unlawful interference by any individual defendant-appellee. MCR 2.116(C)(8); *Ypsilanti Fire Marshal*, *supra* at 544. Accordingly, we find no basis for disturbing the trial court's decision to dismiss Count III with respect to any individual defendant-appellee.

With respect to the separate gross negligence and negligence claims in Counts I and II of the more definite statement, we uphold the trial court's decision that a more definite statement was necessary to the extent that plaintiff's claims were predicated on the same alleged parental burial rights underlying Count III. We are not bound by a party's choice of labels for an action because this would place form over substance. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). The tort of interference with the right of burial can be grounded on negligent or intentional conduct. *Allinger*, *supra* at 808.

To the extent that plaintiff attempted to plead a gross negligence or ordinary negligence claim that falls outside the common-law tort of interference with a right of burial, we uphold the trial court's decision because plaintiff did not plead a relationship with any individual defendant-appellee that gives rise to a duty. See *Buczkowski v McKay*, 441 Mich 96, 100; 490 NW2d 330 (1992) (duty concerns whether a defendant is under any obligation to act for the plaintiff's benefit), *Hampton v Waste Mgt of Michigan, Inc* , 236 Mich App 598, 602; 601 NW2d 172 (1999) (duty can arise by statute, contract, or common-law principles). "It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff." *Fultz v Union-Commerce Assocs*, 470 Mich 460, 463; 683 NW2d 587 (2004), quoting *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997). Summary disposition is proper under MCR 2.116(C)(8) if the defendant does not owe a duty to the plaintiff under the alleged facts as a matter of law. *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001); *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998).

Turning to plaintiff's claim in Count IV, negligent infliction of emotional distress, we note that this is a limited tort that is recognized where a person witnesses the negligent injury or death of a third person. It has not been extended to other situations. *Duran v Detroit News, Inc*, 200 Mich App 622, 629; 504 NW2d 715 (1994); *Gustafson v Faris*, 67 Mich App 363, 369, 241 NW2d 208 (1976); see also *Nugent v Bauermeister*, 195 Mich App 158, 161; 489 NW2d 148 (1992) (tort is limited to immediate family members). Although plaintiff alleged a parental relationship with the decedent, she has not substantiated her position that the tort applies to the allegations set forth in the more definite statement regarding the circumstances of the autopsy. Contrary to MCR 2.111(B), plaintiff's vague allegations that the "events alleged herein" caused her severe emotional distress were insufficient to reasonably inform the individual defendants-appellees of this novel theory or how it applies to each of them. At best, plaintiff's vague allegations appear to be an attempt to restate Count III. Therefore, the trial court did not abuse its discretion in ordering another more definite statement.

Finally, we reject plaintiff's claim that she plainly pleaded a claim for intentional infliction of emotional distress in Count V. Although an intention may be alleged generally, MCR 2.112(B)(2), the allegation regarding the action of Hurley Medical Center and each individual defendant-appellee is too vague to provide reasonable notice of the extreme and outrageous conduct that each individual defendant-appellee was claimed to have intentionally or recklessly committed. MCR 2.111(B). Alternatively, we uphold the trial court's decision to require another more definite statement because the conclusory

allegation was insufficient to state a claim pursuant to MCR 2.116(C)(8). See *Walsh v Taylor*, 263 Mich App 618, 634; 689 NW2d 506 (2004).

In sum, the trial court reached the right result in ordering another more definite statement, regardless of whether MCR 2.111(B) or MCR 2 .116(C)(8) provides the appropriate framework for reviewing the five counts in the more definite statement. Accordingly, plaintiff has not demonstrated any error affecting the trial court's subsequent April 12, 2006, order dismissing the case with respect to each individual defendant-appellee.

Plaintiff also argues that the trial court erred in awarding attorney fees and costs in favor of Hurley Medical Center in its April 3, 2006, order. Because Hurley Medical Center agrees on appeal that the award does not comport with any ruling made by the trial court, we vacate the portion of the court's order awarding attorney fees and costs to Hurley Medical Center. See *McDonald's Corp v Canton Twp*, 177 Mich App 153, 158-159; 441 NW2d 37 (1989).

Affirmed in part and vacated in part.

/s/ Alton T. Davis
/s/ Bill Schuette
/s/ Stephen L. Borrello